


UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
CENTRAL DIVISION

**FILED**  
AUG 18 2009  
  
CLERK

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MARLON DALE SUN BEAR

CIV 08-3021

Petitioner,

-vs-

ORDER GRANTING  
CERTIFICATE OF APPEALABILITY

UNITED STATES OF AMERICA,

Respondent.

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TO THE EIGHTH CIRCUIT COURT OF APPEALS:

This Court denied petitioner's motion to vacate or set aside sentence under 28 U.S.C. § 2255. Petitioner filed a motion for a certificate of appealability, Doc. 5, and a notice of appeal, Doc. 8. Pursuant to 28 U.S.C. § 2253, a certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right. Petitioner has made such a showing.

Petitioner pleaded guilty to second degree murder and, on January 7, 2002, was sentenced to 360 months custody. Petitioner's sentence was enhanced based upon the finding that he was a career offender under the Federal Sentencing Guidelines. His conviction and sentence were upheld on appeal. Petitioner filed a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255, relying upon the decisions of the United States Supreme Court in Begay v. United States, \_\_\_ U.S. \_\_\_, 128 S.Ct. 1581, 170 L.Ed.2d 490 (April 16, 2008), and the United States Court of Appeals for the Eighth Circuit in United States v. Williams, 537 F.3d 969 (8th Cir. August 11, 2008). I denied the motion to vacate and summarily dismissed the motion based upon the fact that Begay has not been found to be retroactive on collateral review to cases that were final when Begay was decided.

IT IS HEREBY CERTIFIED that there does exist probable cause of an appealable issue with respect to the order denying petitioner's motion to vacate or set aside his sentence as it

relates to the retroactive application of Begay to the petitioner's case. Petitioner's application for a certificate of appealability, Doc. 5, is granted as to that issue.

Dated this 18<sup>th</sup> day of August, 2009.

BY THE COURT:



CHARLES B. KORNMAN

United States District Judge

ATTEST

JOSEPH HAAS, CLERK

BY  Deputy

(SEAL)